IN THE

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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-640

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER WOMEN SIMILARLY SITUATED,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

INTEREST OF THE AMICUS CURIAE.[1]

The Chamber of Commerce of the United States of America is a federation consistng of a membership of over thirty-seven hundred (3700) state and local cambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent it members' views on questions of importance to their vital interests and to render such assistance as it can to court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g.*, *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1961 1973); *Griggs* v. *Duke Power Company*, 403 U. S. 365 (1971); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213, 34 L. Ed. 2d 422 (1972); *Dewey* v. *Reynolds Metal Co.*, 402 U. S. 689 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *Alexander* v. *Gardner-Denver Co.*, S. Ct. Docket No. 72-5847, 466 F. 2d 2096 (CA 10, 1973); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970) and *Super Tire Engineering Co. et al.* v. *McCorkle et al.*, S. Ct. Docket No. 72-1554, 469 F. 2d 911 (CA 3, 1972).

There are issues in this case that are of major importance to the Chamber's members: whether an employer may exclude maternity and related conditions from his disability program

1. Consents of all parties to the brief being filed have been secured.

without being guilty of illegal sex discrimination; what deference is due to the Equal Employment Opportunity Commission's new maternity guideline; and whether Title VII of the Civil Rights Act of 1964 requires employers to provide fringe benefits for female employees absent from work for reasons of pregnancy. These issues are matters of national concern because most employers have maternity leave policies and most employers come within the provisions of Title VII of the Civil Rights Act. Further, the collective bargaining agreements of a substantial number of these employers contain provisions concerning the payment of fringe benefits. The Chamber is, thus, vitally concerned that these questions be properly resolved.

The issues presented here are, as well, issues of first impression. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT.

This case presents the issue of whether a state statute may exclude maternity benefits from a state disability insurance program, which is intended to provide broad coverage at a minimal cost, without violating the Equal Protection Clause of the Fourteenth Amendment. This issue, however, can be viewed more broadly and when so considered this case has national and far reaching significance. Thus, while the constitutional question is significant, even more compelling are closely related questions concerning the Equal Opportunity Commission's new opinion guideline, effective April 5, 1972, on pregnancy and childbirth. This guideline states in part: "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." (Section 1604.10 (effective April 5, 1972))

Two issues of national importance are occasioned by this guideline:

1. Should this Court give any weight to the Commission's opinion or guideline on pregnancy and childbirth?

2. Should an employer be required to provide fringe benefits for pregnancy or maternity on the same terms as he provides these benefits for illness or injury?

It is apparent that the question of whether an employer covered by Title VII may exclude maternity and illnesses related to pregnancy from his insurance program will be a question that will frequently trouble every employer who provides insurance coverage for his employees, and, in addition, will puzzle lower courts unless this Court provides guidance.

While this Court has heard arguments in the related *La Fleur*

and *Cohen* cases,[2] there is a significant difference between those cases and the instant case. *LaFleur* and *Cohen* involved the narrow issue of whether school boards' policies requiring mandatory maternity leave in the fourth or fifth month of pregnancy violated the Equal Protecton Clause of the Fourteenth Amendment. That is, the issue was whether there was a rational basis for an employer to treat all pregnant employees alike without considering an individual's ability to work despite pregnancy. Here, this Court is asked to consider whether an employer may exclude a disability or illness from coverage under his employee benefit program without being guilty of sex discrimination simply because the excluded condition occurs only to one sex. To focus more closely on this question, it is apparent that an employer implementing his benefit insurance program may, if he chooses, exclude a condition, such as heart disease, which affects both men and women without violating any law. Does an employer, then, by excluding maternity and related conditions as covered risks under his benefit program thereby violate Title VII whether or not he presents sound reasons to justify the exclusions? The E. E. O. C. and the Appellee say yes. Reason dictates the contrary. This Court has not spoken.

The *amicus* believes that an employer should be able to formulate reasonable rules to promote the objectives of his insurance program. These objectives are to provide broad coverage and maximum benefits at a minimal expense. Based upon experience and information, an employer may believe that the inclusion of maternity and related conditions as covered risks will result in excessive demands upon his fund and therefore will require either an increase in premiums for all employees or a reduction in benefits to all employees. In those circumstances, the employer should be able to exclude maternity and related conditions as covered risks without being guilty of

2. Nos. 72-777 and 72-1129: oral argument on these cases was heard by this Court on October 15, 1973.

sex dscrimination. This exclusion is consistent with the legitimate objectives of the disability program. Yet the E. E. O. C. by brand new opinion guideline effective in 1972 says that the very exclusion of maternity benefits from disability programs, without more, violates Title VII and the Appellee here urges that such an exclusion *per se* violates Amendment Fourteen.

This Court has not passed upon the constitutional issue or the related issues concerning the E. E. O. C.'s guideline and *LaFleur* and *Cohen* do not reach these questions.

The *amicus* believes that this case provides an ideal vehicle for this Court to provide guidance to employers who come within the provisions of Title VII of the Civil Rights Act and either exclude maternity as a covered risk under insurance programs, or do not provide benefits for this condition on the same terms as they provide benefits for illness or injury. These issues presented here are of national scope and involve countless employers. These issues are significantly different than the issues presented in *Cohen* and *LaFleur*.

The *amicus* will first discuss the weight that should be given by courts to administrative guidelines, with particular emphasis on the weight that should be accorded to the E. E. O. C.'s 1972 guideline concerning pregnancy and childbirth. The *amicus* will then consider whether Title VII requires an employer to provide fringe benefits for maternity on the same terms as he provides these benefits for illness or injury. Finally, the *amicus* will discuss the constitutionality of the statute involved in this case.

ARGUMENT.

I.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S GUIDELINE RELATING TO PREGNANCY AND CHILDBIRTH IS ENTITLED TO NO WEIGHT BY THIS COURT.

It is the position of the *amicus* that the Commission's Sex Discrimination Guidelines are merely current opinions of the Commissioner as to the meaning of Title VII[3] and that, therefore, these guidelines do not have the force of law. Consequently, this Court has complete liberty to decide whether or not it will accord weight to the Commission's opinions, and if so, how much. In this proceeding, the *amicus* believes that this Court should give no weight whatever to the Commission's opinion that fringe benefits should be provided for pregnancy and maternity on the same terms as these benefits are provided for illness or injury.[4]

A. In General an Agency's Opinions Are Distinct from an Agency's Legislative Rules.

At the outset, however, it is well to distinguish between an agency's opinions or interpretative rulings on one hand and its legislative rules on the other. This distinction is background necessary to fully appreciate the *amicus*' position that the Commission's guidelines are but the Commissioner's *current opinions*.

A well reasoned judicial treatment of the distinction between agency opinions or what the court calls "interpretative rulings" and legislative regulations is found in *Gibbson Wine Co., Inc. v. Snyder*, 194 F. 2d 329 (CADC, 1951) at 333. The court stated:

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3. Title VII of the Civil Rights Act of 1964, Sections 701-16, 42 U. S. C. Sections 2000e to 2000e-15 (1964).

4. Section 1604.10 (effective April 5, 1972.)

"The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative Officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implentary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means."

Professor Davis in his treatise on administrative law highlights this distinction:

"The distinction between interpretative rules and legislative rules is an essential part of our system, even though the Supreme Court has never provided a full-bodied discussion of it. A legislative rule is the product of an exercise of legislative power by an agency, pursuant to a grant (whether explicit or not) of legislative power by the legislative body; a court will no more substitute judgment of the content of a valid legislative rule than it will substitute judgment on the content of a valid statute. A legislative rule is valid if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.

"Interpretative rules are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law. Interpretative rules usually interpret the statute, but sometimes they properly go beyond the statute, and when they do they are still called interpretative rules even though they are not interpretative in the literal sense."[5]

This distinction between an agency's opinions and its legislative rules is significant because as we will see "courts often substitute judgment as to the contents of an interpretative rule but almost always . . . refrain from substituting judgment as to the content of a legislative rule."[6]

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5. Davis, *Administrative Law Text*, Section 5.11 (1959).
6. *Id.* at Section 5.03.

B. An Agency's Opinions Have No Force or Effect of Law and Courts Have Liberty to Determine What Weight to Give to Them When Considering Statutory Issues.

This Court in *Zuber et al.* v. *Allen et al.*, 396 U. S. 168 (1969), discussed the weight given to administrative opinions and stated that while contemporaneous opinions are entitled to weight they are "only one input in the interpretational equation. . . . The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress." (at 192-193)

The lower courts have fully agreed with *Zuber*. A particularly instructive case that discusses what judicial deference is given to administrative opinions is *O'Neil* v. *United States*, 281 F. Supp. 359 (ND Ohio ED 1968). In that case the court observed that all regulations are not entitled to equal weight before the courts.

> "A court has greater freedom when passing on an interpretative rule than a legislative one. In the case of an interpretative rule, the legislature has not delegated power to an agency to make a rule which is binding upon the courts. An interpretative regulation does not prevent a reviewing court from substituting its judgment on questions of desirability or wisdom. 'The law is embodied in the statute and the court is free to interpret the statute as it sees fit.' "

The Court in *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1101, 1103 (DC DC 1968) bluntly stated that an interpretative rule is " . . . not a regulation having the force or effect of law."

We have now seen generally the distinction between administrative opinions and legislative rules and also that it is important for courts to make this distinction in order to define the extent of their powers to interpret statutes when confronted with administrative regulations. When confronted with agency opinions a court may substitute its judgment for the agency's

and reach a different conclusion than did the agency on the same facts.

C. The E. E. O. C.'s Sex Discrimination Guidelines Are an Agency's Opinions and Consequently Do Not Have Effect of Law.

It is apparent that the E. E. O. C. guidelines are not legislative rules as the courts and commentators have defined that term, but are merely expressions of current opinions by the administrative officers as to the meaning of the statute. Therefore, these guidelines do not have the force of a law binding upon a court, and a court is at liberty, when confronted with an issue relating to Title VII, to substitute its judgment on "questions of desirability and wisdom" and to reach a different result than did the Commissioner when he considered the same issue. The interpretive nature of the guidelines is seen from the guidelines themselves:

> "Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U. S. C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 29 C. F. R. Part 1604 (1972).[7]

Courts have recognized that the E. E. O. C.'s guidelines are opinions and consistent with judicial decisions regarding administrative opinions generally have held *that these guidelines do not have "the force or effect of law." American Newspaper Publishers Association* v. *Alexander, supra* at 1103 (emphasis supplied).

Fully consistent with this opinion is the Sixth Circuit's decision in *Espinoza* v. *Farah Manufacturing Co.*, 72-671 (Argument heard Oct. 10 and 11, 1973) 462 F. 2d 1331 (CA 6, 1972) 4 FEP 931. The court in *Espinoza* refused to

7. These guidelines are based on 42 U. S. C. Section 2000e-12(b) (1970) which suggests that such opinions may be issued by the Commission.

defer to an E. E. O. C. guideline which equated discrimination on the basis of citizenship with the prohibited discrimination on the basis of national origin. After the court independently determined that the discrimination based on citizenship was not a "cover-up" for discrimination on the basis of national origin, the court refused to follow the E. E. O. C.'s opinion observing: "Thus to the extent such [citizenship] discrimination has been declared by the E. E. O. C. to be per se illegal, we refuse to follow its regulation. . . . While acknowledging deference is due, *blind adherence is not.*" (emphasis supplied) 462 F. 2d at 1335.

The E. E. O. C.'s guidelines, then, need not be followed blindly. They are but the Commission's current opinions as to the statute's meaning and courts are free to arrive at their own opinion and to accord no weight to the agency's. It is the court's responsibility to "construe the statutory language employed by Congress" and this responsibility cannot be abdicated to a Commissioner.

Indeed there is reason that this Court should not defer to any extent to the E. E. O. C.'s guidelines. On March 24, 1972 Congress invested the Commission with prosecutorial powers. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law.[8]

The Commission was rather required to prosecute its cases in a federal district court, and it is this court that is to interpret the Civil Rights Act and apply that law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to create a body of substantive labor law. Within the statutory framework of the National Labor Relations Act, the General

8. In Section 713(a) of Title VII (42 U. S. C. 2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations. 110 Cong. Rec. 2575 (1964).

Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[9] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor considers illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The Commission's opinions are just that—its view of what constitutes illegal conduct and a court should treat them as nothing else. When dealing with a Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

D. The Agency's 1972 Opinion Declaring That an Employer Must Provide Benefits for Maternity or Pregnancy on the Same Terms As He Provides Benefits for Illness or Injury Is Entitled to No Weight by This Court Because It Is Inconsistent with Prior Opinions, Because It Was Not Issued When Title VII Was Enacted, and Because It Demonstrates None of the Thoughtfulness Commonly Associated with Agency Expertise.

While we have seen that E. E. O. C. guidelines do not have a force of law, and that a court need not defer to them when considering a Title VII issue, the crucial question here is what, if any, weight should this Court give to the Commission's opinion that "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[10]

The amicus contends for reasons expressed in subpart C that this Court should give no weight to this guideline. There are

9. The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

10. Section 1604.10 (effective April 5, 1972).

in addition other important reasons why no weight should be accorded to this guideline.

Courts confronted with similar questions involving opinions of other agencies, have applied a variety of factors[11] in evaluating the weight to give to these opinions. Accordingly, guided by these factors, we shall examine the Commission's 1972 opinion.

The factors that are commonly recognized by courts when they evaluate the weight to give administrative opinions are:

First, was the opinion a contemporaneous construction of the statute it purports to interpret?

Second, has the opinion been applied consistently by the agency over a long period of time?

Third, was the opinion issued with evident thoughtfulness?

Fourth, has the agency demonstrated expertise in dealing with the subject discussed by the opinion?

When these factors separately or in confederation are applied to the Commission's 1972 opinion concerning pregnancy and maternity benefits, it will be clear that this opinion is entitled to no weight by courts when they decide Title VII issues.

1. Was the Commission's 1972 Opinion a Contemporaneous Construction of Title VII, and Has It Been Applied Consistently by the Commission for a Long Period of Time.

The short answer to both parts of this question is "no." However, a brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[12] and 1969 the Commission issued a number of opinions, announcing

11. *Skidmore, et al.* v. *Swift and Co.*, 323 U. S. 134 (1944); *In Re: Petition of Chin Thloot Har Wong*, 224 F. Supp. 155 (D. C. SDNY. 1963) at 165; Davis, *Administrative Law Text*, Section 5.03 (1959).

12. Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

For example, in an opinion letter, dated November 10, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

> "In a recent opinion letter regarding pregnancy we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."

Five days later, the General Counsel said:

> "Gentlemen:
>
> You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay*; although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.
>
> *The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity,* since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. *On the other hand, we do not believe that an employer*

must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.

Sincerely yours,

CHARLES T. DUNCAN
General Counsel"

(November 15, 1966)
(emphasis supplied)

A month later, he said,

"You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.

"In a recent opinion letter regarding pregnancy, we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expenses for the delivery of employees' children, *but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.*" (December 9, 1966, as reported in CCH Employment Practices, 12-21-66, paragraph 17, 334.44) (emphasis supplied)

Within sixteen months after the enactment of Title VII, then, the Commission repeatedly advised employers that they need not "provide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission still demonstrating consistency maintained this position through 1969. On June 19, 1969, a representative of the Commission announced that the Commission "views

pregnancy as a temporary disability, and has not to date equated it with sickness."

The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[13]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then, for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy. The 1972 opinion, of course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject and because it is totally and remarkably inconsistent with prior opinions issued over the last seven years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII. What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contemporaneous construction, the answer is, "none." Moreover, the answer does not change when the remaining relevant criteria are applied.

2. Was the 1972 Opinion Issued with the Evident Thoughtfulness That Marks Agency Expertise?

There is no evidence that the new 1972 opinion was formulated with consideration for alternatives or concern for ramifications. Moreover, when the Commission, after nearly seven years of consistantly applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy, or by new facts not previously in existence. Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideration.

13. CCH, *New Developments, Paragraph* 8804 E. E. O. C Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

The Commission has offered no such proof here. Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then is now clear. In determining whether to defer or not and in evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 opinion concerning fringe benefits and maternity or pregnancy is viewed in light of these factors, it is clear that this opinion is entitled to neither weight nor deference.

An additional reason why the pregnancy guideline is entitled to no weight is apparent when we consider that the pregnancy opinion was promulgated on April 5, 1972. Rather than urge its new views on pregnancy and childbirth before Congress when that body was considering its 1972 amendments to the Civil Rights Act, the Commission chose to lie in wait until those amendments were effective on March 24, 1972. Then dressed in new prosecutorial robes the Commission announced that for the first time it considered pregnancy and illness identical and employers would henceforth be required to treat them alike when applying personnel policies. The Commission apparently hoped to gain quick judicial approval under the authority of *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971). However, *Griggs is distinguishable*. For one thing when *Griggs* was decided the Commission did not have prosecutorial powers. For another, the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[14] must not be overvalued, but rather should be confined to the facts of that case. As the court in *Espinoza* v. *Farah Manufacturing Co.*, *supra* observed:

> "In *Griggs*, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U. S. at 434. Moreover, in that case the Court made an independent analysis of the

14. at 433-434.

pertinent legislative history and decided that 'the conclusion is inescapable that the E. E. O. C.'s construction . . . comports with Congressional intent.' 401 U. S. at 436

Here, however, there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.

II.

AN EMPLOYER NEED NOT PROVIDE FRINGE BENEFITS FOR MATERNITY OR ILLNESSES RELATED TO PREGNANCY ON THE SAME TERMS AS HE PROVIDES THESE BENEFITS FOR ILLNESS OR INJURY.

We have seen that a court need not defer to the Commission's guidelines, including the Commission's 1972 opinion concerning pregnancy and childbirth. There are, moreover, compelling reasons that an employer should not be required to treat pregnancy and illness alike and should not be required to provide fringe benefits for maternity or pregnancy on the same terms as he provides these benefits for illness or injury.

A. Congress Did Not Intend to Require That Employers Provide Fringe Benefits for Pregnancy and Maternity in the Same Manner That These Benefits Are Provided for Illness or Injury.

In considering Congressional purpose or intent here, it is well to begin by examining the function of the E. E. O. C. and its approach to fringe benefits and maternity. The E. E. O. C. is the agency charged by Congress with the administration, interpretation and enforcement of Title VII of the 1964 Civil Rights Act. It can logically be presumed, therefore, that Congress was well informed as to the interpretations its Commission was applying to Title VII, particularly during early

stages of the Commission's existence. Because the Commission consistently and explicitly stated for the *first seven years* since the enactment of Title VII that employers were not required to provide the same fringe benefits for pregnancy as they provide for illness or to treat these distinct conditions in the same manner, Congressional awareness of this interpretation can be legally presumed.[15] Despite being aware that the Commission did not seek to compare an employer's treatment of pregnancy with his treatment of illness or injury, Congress did nothing to override the Commission's interpretation and its consequent application of that part of Title VII. Congress did not by statutory amendment, or otherwise seek to amend or to modify the Commission's interpretation.

Had Congress intended to require an employer to treat pregnancy and illness alike when devising or applying a personnel maternity policy, it had ample opportunity to manifest this intent in 1972 when it enacted a number of amendments to the Civil Rights Act of 1964. In a parallel situation involving religion, Congress required an employer to accommodate his work schedules and employment policies to the individual religious practices of his employees. This occurred when Congress reacted to the Fifth Circuit's decision in *Dewey* v. *Reynolds Metal Co.*[16] There, the court was faced with a Commission guideline that required an employer accommodate his business requirements to the religious beliefs of his individual employees or be held in violation of Title VII. Pursuant to this guideline, an employee, Dewey, charged that his employer discharged him for refusing, because of his religious beliefs, to arrange for a replacement to perform Sunday overtime work. The court held;

15. Congress has expressly provided that an employer's reliance on the Commission's interpretative opinions is a valid and complete defense in an E. E. O. C. proceeding. Erroneous interpretations if raised as valid defenses to E. E. O. C. proceedings could seriously frustrate the effective implementation of the Act. Thus, it is readily apparent that Congress intended to be kept informed of the Commission's interpretations. (42 U. S. C. 2000e-12b (1970).)

16. 402 U. S. 689 (1971), 429 F. 2d 324 (CA 6, 1970).

"The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. . . .

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the E. E. O. C. regulations which in our judgment are not consistent with the Act." at 334

In effect the court recognized that while the Act prohibited an employer from constructing his hiring, promotion or discharge policies so as to discriminate because of religion, the Act did not require an employer to adjust his personnel policies to accommodate the religious practices—such as the manner of Sabbath worship—of his individual employees. Congress recognized that the court's interpretation was accurate because it reacted by amending the Act in 1972 to require employers to adjust their work schedules and personnel policies to accommodate the various religious practices of their employees.

Because religion and sex are referred to in the 1964 Act in a like manner, it is reasonable to assume that Congress intended the Employer's obligations in the area of sex discrimination to be similar to those in the area of religious discrimination. By the 1964 Act Congress intended neither that an employer accommodate his personnel policies to individual religious practices nor that an employer pay maternity benefits in the same manner as he provides benefits for illness or injury. However through Congress in 1972 amended the 1964 Act to specifically enlarge an employer's responsibility in the area of religious discrimination, Congress did not enact an amendment requiring an employer to treat pregnancy and illness alike and to provide benefits for pregnancy on the same terms as he provides benefits for illness. This Congressional silence is even more revealing when the following facts are considered:

1. Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect "to a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health.".

2. Congress had access to arbitrators' decisions which for two decades equated pregnancy and illness and required an employer to apply the same benefit policies to both.[17] Yet despite these decisions Congress chose not to require that employers treat pregnancy and illness alike in fringe benefit programs.

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. It enacted an amendment in the area of religious discrimination, and the Railroad Unemployment Insurance Act specifically treats maternity as a form of illness. Congressional silence, then, must be taken to mean that Congress has no intention in 1972 to require an employer, when devising or implementing his employment policy, to equate pregnancy and illness and to treat them in the same manner with respect to fringe benefits, or related matters. This is all the more apparent when we recall that the Commission for seven years without Congressional censure had stated that pregnancy and illness were not indentical and had not required an employer to provide the same fringe benefits for pregnancy as he provides for illness.

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17. *Middleton Board of Education*, 56 LA 830 (1971); *National Lead Co.*, 18 LA 528 (1952); *Republic Steel Corp.*, 37 LA 367 (1961).

B. The Commission Consistently Recognized That an Employer Need Not Treat Pregnancy and Illness Alike When Providing Benefits, and the Court May Rely on These Precedental Guides When, As Here, the Commission Without Persuasive Reason Departs from Its Own Precedent.

After seven years of consistently saying that employers need not treat pregnancy and illness alike, the Commission, in a dramatic shift, equates pregnancy and illness for disability policy purposes. What evidence was offered by the Commission to justify its turn about? The Commission did not hold public hearings or invite public debate. It did not suggest that it suddenly devined a heretofore unnoticed Congressional intent. It did not claim to have discovered the law. It simply pronounced its guideline and will seek to win for it judicial approval so that its newest opinion can be raised to the level of judicial fiat.

The *amicus* believes that the Commission's departure from its own precedent can be justified, if at all, only if the Commission proves by pursuasive evidence that this radical shift was caused by very good reasons, *e.g.*, a newly announced Congressional purpose directly relating to the Commission's new theory or by facts that did not exist when the Commission pronounced its earlier opinions. Because the Commission at no time has demonstrated that such reasons exist, its departure from its own precedent should not be countenanced by this Court, particularly when the Commission's new opinion will cause substantial changes in employer-employee relations including major revisions in employer benefit programs.

Strong support for the *amicus'* position if found in the Fourth Circuit's opinion of *N. L. R. B.* v. *Quality Manufacturing Co.*[18] and the *amicus* offers that court's well reasoned opinion here as a guide.

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18. No. 72-1663, decided July 19, 1973 (83 LRRM 2817).

In *Quality*, the National Labor Relations Board purporting to interpret the Labor Act held for the first time in its history that an employer violated that Act by discharging an employee who insisted upon union representation at a meeting called by the employer to investigate the employee's conduct. The Court rejected the Board's holding because it "departed from existing case law[,]" and because,

> ". . . never has it been thought, as the Board would hold here, that [statutory] rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment or even his working conditions.' "

The Court observed that the Board did not justify or support its "new theory" by a pursuasive analysis of the Labor Act or of legislative history, and concluded that the Board has no power to "alter or rearrange employer-employee relations to suit its very whim." The parallels between *Quality* and this case is clear. Both in *Quality* and in this case, an agency claiming to interpret its statute departed from its own precedent without advancing pursuasive reasons for doing so. In both *Quality* and in this case, the new agency opinion will have considerable impact on employer-employee relations. As did the court in *Quality* this Court should also reject an agency's departure from its own precedents when the agency advances no cogent reasons to justify its shift.

Rather than sanctioning and deferring to this abrupt departure from precedent, this Court, consistent with Congressional intent, should permit employers to treat maternity and sickness or injury differently when planning and implementing fringe benefit programs, be particularly when the employer advances cogent business reasons to justify this difference in treatment.

C. An Employer May Exclude Pregnancy, Maternity and Related Conditions from His Benefit Program Without Violating Title VII Even Though These Conditions Are Unique to the Female Sex.

Though pregnancy and maternity are unique to females, it does not follow that an employer violates Title VII when he excludes those conditions or related illness as covered risks under his disability program. The objective of an employer's disability plan is to provide the broadest coverage and maximum benefits for as little cost to the employer or employees as possible. An employer without violating any law should be able to formulate rules to promote this objective. Based on study or information an employer, may believe that the inclusion of a disease, such as heart disease, which happens to effect both sexes, will result in excessive demands upon his fund and therefore will require either an increase in premiums from all participants or a reduction in benefits to all participants. Under those circumstances, it is clear that the employer is able to simply exclude heart disease as a covered risk without violating any law. Similarly, based on study or information, an employer may believe that the inclusion of maternity or related conditions will result in excessive demands on his fund and require increased premiums or reduced benefits. Under these circumstances, an employer should be able to exclude maternity and related conditions as covered risks without being guilty of sex discrimination even though the excluded conditions affect only one sex. His decision to exclude maternity and related conditions is fully consistant with his desire to protect the fiscal integrity of his disability program and to provide maximum disability benefits at the lowest cost. The employer should not, therefore, be found to have violated Title VII.[19]

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19. The Supreme Court of the State of California stated in *Clark* v. *California Employment State Com.*, 166 C. A. 2d 326 (1958)

Similarly, if the cost of prostate operations increased, an employer would be able to exclude this operation as a covered risk, if in his judgment inclusion would defeat the goal of his benefit program, without being guilty of unlawful sex discrimination. It is overly simplistic to conclude that by excluding a condition occurring to only one sex from his disability program an employer *without more* unlawfully discriminates against that sex because such a conclusion overlooks the rational practical judgments that an employer must make if he is to maintain the objectives of his disability plan and automatically equates an employer's attempt to construct a comprehensive benefit program at a minimal cost to purposeful discrimination against a group or a class.

Griggs v. *Duke Power Co.*, 401 U. S. 424 (1971) is in accord with the position herein asserted. There, the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Negroes at a substantially higher rate than white applicants. Because these requirements were not shown to be related to successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Negroes. This Court stated that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

While *Griggs* involved discrimination between different races, in the area of maternity fringe benefits there is no such com-

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"It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from coverage provided by private contracts of health and accident insurance in order to effect a premium rate lower than is required in the absence of such exclusion." at pp. 331 and 332.

It is settled that exclusions or classifications based upon economic considerations can be valid. *O'Gorman and Young* v. *Hartford Insurance Co.*, 282 U. S. 251 (1930); *Borden's Co.* v. *Baldwin*, 293 U. S. 194 (1934).

parable competition between sexes and a regulation excluding maternity benefits does not, therefore, constitute illegal sex discrimination any more than the hiring of one Negro rather than another would constitute illegal racial discrimination.

In addition, while this Court in *Griggs* found that the requirements were unrelated to measuring job performance, and, therefore, discriminatory, this Court stated that nothing in the Act prevents an employer from using tests which relate to job performance and employers may require applicants to be fit for the job. Therefore, consistent with *Griggs*, if an employer excludes maternity benefits or the cost of any other type of benefit from his insurance program because he reasonably believes that the cost of these benefits would defeat the objectives of this program, these exclusions are related to the program's objectives and should not be proscribed by Title VII. Just as Title VII permits the use of tests related to job performance even though these tests could result in one race performing better than another, so too Title VII permits the exclusion of maternity benefits from insurance programs when this exclusion is necessary to maintain the program's objectives even though the exclusion treats pregnant women differently than all other persons. Moreover, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina County employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Therefore, in *Griggs*, this Court employed a stringent test. Here, the exclusion, from benefit programs, of maternity benefits only affects a portion of one sex. Not only is there no discrimination between the sexes because of this exclusion but also the effect is not nearly so broad as the effect of the employer's requirements in *Griggs*. Whereas the requirements in *Griggs* excluded virtually all blacks all of the time, the exclusion here affects only some women some of the time. Indeed, pregnant women are treated exactly like men and women

with respect to sick leave and disability benefits. To accord them maternity benefits is in effect giving only those women who become pregnant extra benefits. For these reasons, the strict test utilized in *Griggs* should not apply here. Rather, if there is a ***reasonable basis*** to exclude maternity benefits from insurance programs, the exclusion should not violate Title VII. If a reasonable basis exists, a court should not substitute its judgment for the employer's. The E. E. O. C.'s guideline which proscribes the exclusion of maternity and pregnancy benefits regardless of the employer's reason for this exclusion is contrary to both this Court's decision in *Griggs* and to Congressional intent.

Indeed, Congress recognizes that employers should be allowed to formulate and implement employment policies including maternity benefit regulations without violating Title VII even though the employer by these regulations will treat pregnant women differently from non-pregnant women or men. This Congressional recognition is apparent because Congress has not directed that employers treat maternity and illness or injury in the same manner. Consistent with Congressional intent, this Court should *not* invade the province of Congress and strike down employer maternity regulations because they do not provide fringe benefits for maternity on the same terms as benefits are provided for illness or injury.

Like Congress, the Commission has stated consistently (until April, 1972) that an employer need not provide the same fringe benefits for Maternity as he provides for illness or injury and may exclude Maternity as a covered risk. For example, the Commission stated:

> "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability *unique to the female sex* and more or less to be anticipated during the working life of most women employees. Therefore, *an insurance or other benefit plan may simply exclude maternity as covered risk, and*

such exclusion would not in our view be discriminatory." (Opinion letter of General Counsel, November 10, 1966) (Emphasis Supplied.)

Consistent with the Commission, well known leaders in women's rights movements, in testimony before Congressional sub-committees, have acknowledged that distinctions between benefits paid for maternity and benefits paid for illness do not constitute illegal sex discrimination.

> "*Mrs. Lee Berger Anderson,* President, Women's Bar Association of the District of Columbia: 'My thinking about the maternity benefit is that it is a benefit to the family. It is a benefit to the husband as well as to the children and the prospective mother or wife.' (Page 299)
>
> *Senator Bayh:* 'Primarily, it is the benefit of the children, is it not? You call it a maternity benefit, but it is primarily to help the children.'
>
> *Mrs. Anderson: 'Primarily, to benefit the children.'* (Emphasis added."[20]

Similar testimony occurred in an exchange between Senator Bayh and Mrs. Harmon and Aileen Hernandez:

> "*Senator Bayh:* 'Are you concerned at all about laws whose thrust, it seems to me, could not be changed inasmuch as some laws are aimed directly at the attributes of women as distinct from male, such as laws providing maternity benefits or those relating to criminal assault against women? Do you forsee such an impact on this type of law?'
>
> *Mrs. Myra Ruth Harmon,* President, National Federation of Business and Professional Womens Clubs, Inc.: 'It seems to me these are special aspects of our life and would require special laws. For instance the *maternity laws are provided to help the extension of the human race* and not for—because they are men or women. If a man would bear children he would be under the same law as a

20. Summary of hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, Ninety-First Congress, Second Session, on S. J. Res. 61 (May 5, 6, and 7, 1970), page 299.

woman is and these are entirely different types of laws, in my estimation, than the so-called "protective laws" regarding hours and types of working conditions." (page 37) (Emphasis added.)"[21]

"Aileen Hernandez, President National Organization For Women (Accompanied by Jean Witter, Chairman, Equal Rights Amendment Committee and Brenda Fasteau, Vice President for Legislation: (to Senator Bayh): 'I have heard the two questions you asked earlier, and if I might respond to those specific ones.

'You said maternity benefits, and the other one was criminal assault on a woman. It seems to me the maternity benefits are not a sex benefit. . . .' "[22]

Similar testimony occurred in hearings before subcommittee number four of the Committee on the Judiciary, House of Representatives, Ninety-Second Congress:

"*Mr. Sarbanes:* 'I am not clear on your attitude, whether you consider sex to be a reasonable basis for distinction under any circumstances. . . .'

Hon. Martha Griffiths: 'But you would have to have some distinctions in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference.' (page 51.)"[23]

Because pregnancy is unique to women, an employer's benefit policy which, for example, does not pay for pregnancy leave does not affect women in an area where they must compete with men such as, for example, plant seniority. Consequently, when an employer does not pay women for pregnancy leave he is not treating women *differently* than men as he would be if he denied *women* the right to accrue plant seniority while granting this right to *men*.

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21. *Id.*, page 37.

22. *Id.*, page 64.

23. First Session on H. J. Res. 35,208, and related bills, and H. R. 916 and related bills (March 24, 25, 31; April 1, 2 and 5, 1971, page 51).

Moreover, judicial opinions that have struck down discriminations based upon sex have been dealing with *outmoded stereotypes* based upon *supposed differences between the sexes* where those stereotypes produce distinct employment disadvantages for one sex.[24]

Consistent with the reasoning in these opinions, the real purpose of the sex discrimination law is to outlaw discrimination based upon outmoded sex stereotypes such as those mentioned in the administrative guidelines, including the characterizations that women are not capable of aggressive salesmanship or that men are less able to assemble intricate equipment.[25]

Unlike the so-called protective legislation that denied women jobs in favor of men, an employer's maternity regulation concerning benefits provided in the case of pregnancy does not operate in an area where men and women compete and does not create or perpetuate outmoded sex stereotypes. Accordingly, as this Court has recognized in cases arising under Title VII[26] and the Fourteenth Amendment,[27] there can be no sex discrimination when these regulations are implemented even if pursuant to these regulations the employer treats pregnant women differently than he treats all other employees.

In *Martin Marietta* this Court clearly held that Title VII barred sex discrimination only when one sex was treated differently than *the other.*

In *Martin Marietta* this Court said:

> "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Ap-

24. *E.g., Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (CA 5, 1969); *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA 5, 1971); and *cf. Boyce* v. *Safeway Stores, Inc.*, 351 F. Supp. 402 (DC DC, 1972).

25. 29 C. F. R., Section 1604.2.

26. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971).

27. *Reed* v. *Reed*, 404 U. S. 71 (1971); *Frontiero* v. *Richardson*, 93 S. Ct. 1764 (1973).

peals therefore erred in reading this section as permitting one hiring policy for *women* and another for *men—each* having pre-school age children." (emphasis supplied) at 544

This statement is wholly consistant with this Court's view that sex discrimination occurs only when an employer or a regulation discriminates between men and women in an area where the two sexes are in competition. That is, a violation of Title VII can occur only if there is discrimination based on women vis-a-vis men. In the area of pregnancy regulations there is no such competition.[28]

This Court has at least implicitly recognized that an employer may provide different fringe benefits for maternity than he provides for illness or injury or exclude maternity as a covered risk under his benefit program and yet not be guilty of illegal sex discrimination. In *Frontiero* v. *Richardson, supra,* while four judges of this Court reasoned that sex discrimination is to be severely censured, they did so only because sex like race is an immutable characteristic and like race generally bears no relation to ability to perform or contribute to society. On the other hand pregnancy unlike sex and race is not an immutable characteristic and frequently has a direct relationship to ability to perform or to contribute in a work situation.[29] Consequently,

28. In *Frontiero* v. *Richardson, supra* sex discrimination occurred because a statute commanded dissimilar treatment for *men* and *women* who were otherwise equally qualified for dependent benefit payments. In *Reed* v. *Reed, supra,* sex discrimination existed because a state statute gave perference to the *male* when both a *male* and a *female* otherwise equally entitled applied to administer a decedent's estate.

29. In *Schattman* v. *Texas Employment Commission,* 459 F. 2d 32 (CA 5, 1972) decided March 1, 1972, cert den. 93 S. Ct. 901 (1973) the court approvingly cited the testimony of Dr. M. D. McCauley, an Obstetrician and Gynecologist, who had practiced medicine for thirty-four years and who had presided at the delivery of over 10,000 babies. As reported by that court, Dr. McCauley said:

> "'We have some thirty-two susceptible young women there who are a constant problem in all phases of their work, starting in the last trimester of pregnancy.'

following the reasoning of *Frontiero*, while an employer may not impose rules which discriminate against females in favor of males, he may without violating Title VII treat maternity differently than other disabilities without being guilty of sex discrimination.

We have seen why this Court should accord no weight to the Commission's new pregnancy and childbirth opinion guideline which requires employers to pay the same fringe benefits for maternity as they provide for illness or injury. Rather this Court should recognize that an employer, without violating Title VII, may treat maternity differently than he treats illness or injury when applying his fringe benefit policy because:

1. Congress at no time has considered it to be unlawful sex discrimination if an employer provides different fringe benefits for maternity than he provides for illness, or instead altogether excludes maternity as a covered risk.

2. The Commission entrusted with interpreting Title VII has stated consistently (until its abrupt change in April, 1972) that an employer need not provide the same fringe benefits for maternity as he provides for illness or injury.

3. An employer in operating a benefit program may exclude a condition which if included will defeat the program's objectives, even though the excluded condition affects only one sex.

Dr. McCauley further testified that there is a change in the efficiency of a working woman after the sixth or seventh month of pregnancy; that, in his opinion, a regulation releasing women from their employment after the sixth or seventh month of pregnancy was reasonable; that in a woman after reaching the seventh month swelling of the limbs is very prevalent, especially in the summer; the ability to get around necessitates help and assistance from other employees; jobs they had been able to do themselves they now require help with, or they are unable to do them; they are frequently given to headaches, little irritable things; their personalities change quite a bit; and they are not only hard to live with but they are hard to employ. He further testified that women in that condition are frequently running to the bathroom or after a small bite of food or to loosen their garments because they are too tight."

4. Sex discrimination under Title VII can occur only when an employer or regulation discriminates between men and women in an area where the two sexes are in competition. That is, a violation of Title VII occurs only when there exists discrimination based on women vis-a-vis men. In the area of maternity fringe benefits there is no such competition.

The *amicus* now turns to the constitutional question raised by the exclusion of maternity benefits from the disability insurance program.

III.

THE STATE STATUTE EXCLUDING MATERNITY BENEFITS FROM A DISABILITY INSURANCE PROGRAM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A regulation is measured against the Fourteenth Amendment when it creates a classification of individuals and then treats the individuals in this classification differently than other persons are treated. However, as Justice Frankfurter observed, "classifications is inherent in legislation; the Equal Protection Clause has not forbidden it."[30] Consistent with these observations, this Court has stated that the Equal Protection Clause does not forbid all statutory classification or discrimination, but only that discrimination that can be called arbitrary or invidious[31]. These observations were amplified by the illuminating discussion of Chief Justice Burger in *Reed* v. *Reed, supra.* There, a state statute gave mandatory preference for the male when both a male and a female otherwise equally entitled applied for letters of administration of a decedent's estate. The Chief Justice observed:

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30. *Morey* v. *Doud,* 354 U. S. 457, 472 (1957).

31. "The Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955); *Morey* v. *Doud, supra; Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61.

> "[T]his Court consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike . . ." at 75-76.

The lower courts, too, have recognized that legislative and administrative enactments may treat different classes of persons in different ways without offending the Equal Protection Clause. In *Williams* v. *McNair*, 316 F. Supp. 134, 136 (DC DC, 1970) the Court stated:

> "The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Because this Court has interpreted the Equal Protection Clause as proscribing only arbitrary and invidious statutory discrimination, this Court has developed tests to determine whether or not a regulation creates an arbitrary or invidious discrimination. These tests may be called the "rational basis" or "compelling state interest" tests and it is to a discussion of this Court's application of these tests that we now turn.

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether Or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination.

The rational basis test has been generally employed when this Court has looked to the Equal Protection Clause in considering the constitutionality of a state's regulation. Under this standard of review, a state legislature is presumed to have acted within its constitutional power and a "legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[32] The compelling state interest test, considered by this Court to be an exception to the usual standard of review expressed in the rational basis test, has been utilized by this Court only to review legislative enactments that abridged fundamental constitutional rights or that involved classifications that can be labeled as "suspect". This standard of review does not accord to legislative judgments the usual presumption of validity and requires that the state rather than the complainants justify discrimination found in the enactment by showing that a compelling state need is promoted by this discrimination.

1. The Rational Basis Test.

In applying this test, this Court has recognized that states must have a broad scope of discretion in enacting regulations even if these regulations treat different classes of individuals in different ways and has, therefore, deferred to the judgment of the legislators unless the discrimination created by the regulation has absolutely no rational relationship to a legitimate state purpose. This Court has summarized the rules for testing a discrimination under the rational basis test:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in

32. *Frontiero* v. *Richardson, supra,* 1768 (1973).

> the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary."[33]

Consistent with its pronouncement in *Lindsley*, this Court more recently has observed:

> "Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it . . . the rule of equality permits may practical inequalities' " (Citations omitted)[34]

Still more recently in discussing the rational basis test, this Court has stated:

> "the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[35]

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33. *Lindsley* v. *National Carbonic Gas Co., supra*, at 78-79.
34. *Rapid Transit Corp.* v. *New York*, 303 U. S. 573 (1938).
35. *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1960).

While under the reasonable basis test, a statutory discrimination will not be invalidated by the Equal Protection Clause if any facts can be conceived that would sustain it, it will not be necessary here, as will be seen below, to search long to discover that the classification in the state statute has a patently rational relationship to that regulation's legitimate purpose. Consequently, as will be argued below, the State regulation while excluding maternity benefits does not violate the Fourteenth Amendment.

This Court, then, by applying as a general rule the rational basis test to determine if a discrimination violates the Equal Protection Clause has recognized and acknowledged that it should not sit as a super legislature, but rather, should presume that the states acted within their constitutional powers even though the regulation creates some inequality by treating different classes of persons in different ways. Only in exceptional circumstances has this Court applied the other test—the compelling state interest test—to determine if a statutory classification and discrimination should be avoided by the Equal Protection Clause.

2. The Compelling State Interest Test.

This test has been applied only when a regulation creates a classification which may be judicially regarded as "suspect" or when the regulation may result in an abridgement of a constitutionally guaranteed (or fundamental) right.[36] We will consider each of these branches of the compelling interest test in turn.

(a) *The Suspect Classification.*

While it is difficult to formulate a concise definition of a "suspect classification" we learn from the cases that when a statute creates a classification that is based upon "an immutable

36. *San Antonio Independent School District* v. *Rodriguez*, 93 S. Ct. 1278 (1973).

characteristic determined solely by the accident of birth," and then imposes special disabilities upon members of that classification, the classification has been treated as suspect, subjected to strict judicial scrutiny, and allowed only if shown to be necessary to promote a compelling governmental interest.[37] This Court has held that race, alienage and national origin are inherently suspect because these characteristics frequently bear "no relation to ability to perform or contribute to society."[38] Thus, when a regulation focused on one racial group and treated this group differently than it treated members of other groups, the racial classification created by the regulation was regarded as constitutionally suspect and was subject to strict scrutiny by this Court.[39] Recently, where the sole basis of a classification created by a statute was the sex of the individuals involved, four Justices of this Court found the classification inherently suspect and subjected it to close scrutiny. *Frontiero* v. *Richardson, supra.* There, a federal statute commanded "dissimilar treatment for men and women who are . . . similarly situated [,]" by providing that a service woman may not claim her husband as a dependent in order to obtain increased benefits unless he is in fact dependent upon her for over one-half of his support, while a service man may claim his wife as a dependent without regard to whether or not she is dependent upon him for any part of her support. Whether or not a classification based on sex is "suspect," the *amicus* will demonstrate below that the exclusion of maternity benefits from an insurance program does *not* create a *sex* based classification.

This Court has not only employed the compelling state interest test to review statutes which create classifications which are suspect, but also has utilized this test when determining the

37. *Frontiero* v. *Richardson, supra* (1973); *Shapero* v. *Thompson,* 394 U. S. 618 (1969); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Graham* v. *Richardson,* 403 U. S. 365 (1971); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944).

38. *Frontiero* v. *Richardson, supra,* at 1770.

39. *McLaughlin* v. *Florida, supra.* There, the color of the skin determined whether there existed a criminal offense.

constitutionality of legislation which prevents the exercise of fundamental constitutional rights. We turn now to cases where this Court has considered whether rights asserted were, in fact, "fundamental" and whether the compelling interest or strict scrutiny test should be employed while reviewing legislative judgments that abridge those rights.

(b) *Fundamental Constitutional Rights.*

In *San Antonio Independent School District* v. *Rodriguez, supra*, this Court defined a fundamental right as a right that is "explicitly or implicitly guaranteed by the Constitution." In the earlier case of *Shapiro* v. *Thompson, supra*, Justice Stewart's observations are consistent with those of the Court in *Rodriguez*:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

In practice, this Court has found few rights to be fundamental and has sparingly employed this branch of the compelling interest test when reviewing the constitutionality of legislative enactments. The few rights that this Court has found to be fundamental because they are protected specifically by the Constitution include the right to participate in elections on an equal basis with other citizens in the jurisdiction,[40] the right to travel interstate,[41] the right of personal privacy,[42] and rights related to First Amendment interests.[43] However, this Court has found the following rights not to be fundamental constitu-

40. *Dunn* v. *Blumstein*, 407 U. S. 330 (1972).

41. *Shapiro* v. *Thompson, supra.*

42. *Skinner* v. *Oklahoma, ex rel. Williamson*, 316 U. S. 535 (1942).

43. *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972).

tional rights because they are not explicitly or implicitly guaranteed by the Constitution, even though they have been recognized by this Court to be rights of considerable social significance: the right to welfare benefits;[44] the right to safe and sanitary housing;[45] the right to education;[46] and the right to pursue a particular occupation.[47] In *Dandridge*, this Court recognized that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings[.]"[48] However, this recognition provided this Court no basis for departing from its traditional (rational basis) method of analysis of legislative classifications involving questions of economic and social policy because the right to welfare benefits while socially significant was not constitutionally guaranteed. Similarly, in *Lindsey* this Court recognized the importance of decent, safe and sanitary housing but stated:

> ". . . the Constitution does not provide judicial remedies for every social economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." at 74.

In *Rodriquez*, this Court stated:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education

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44. *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

45. *Lindsey* v. *Normet*, 405 U. S. 56 (1972).

46. *San Antonio Independent School District* v. *Rodriguez*, *supra*.

47. *Williamson* v. *Lee Optical Co.*, *supra*; *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

48. *Dandridge* v. *Williams* at 485.

will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." at 1297.

The lesson of the cases discussed in this sub-part is plain:

First, a suspect classification does not exist unless a regulation creates a classification that is based upon "an immutable characteristic determined solely by accident of birth," and then imposes special disabilities upon members of that classification.

Second, this Court will neither create substantive constitutional rights in order to guarantee them equal protection of the laws, nor subject state legislation to strict scrutiny because this legislation is of social significance. Rather, individual interests are characterized as fundamental and given added protection only if the right to pursue these activities is explicitly or implicitly guaranteed by the Constitution.

Third, unless a legislative enactment abridges fundamental constitutional rights or involves suspect classifications, this Court will employ the rational basis or traditional Equal Protection analysis in determining whether or not a legislative classification is constitutional. Under this test, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[49]

Because the statute here neither creates a suspect classification nor prevents the exercise of a fundamental constitutional right, the Court should employ the rational basis or traditional test to evaluate the constitutionality of the classification created by the statute and find that the classification does not offend the Equal Protection Clause. To this argument we now turn.

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49. *Frontiero* v. *Richardson*, *supra* at 1768.

B. The Statute Excluding Maternity Benefits from the Disability Insurance Program Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

1. The Statute Neither Creates Nor Involves a Suspect Classification.

Whether or not sex is a suspect classification, the statute requiring that maternity benefits be excluded from the disability insurance program does not create a classification based upon sex. Discrimination based upon a sex classification can occur only when the two sexes are in actual or potential competition. *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Phillips* v. *Marietta, supra.*

There is no competition between men and women in the area of pregnancy or maternity regulations. This had been recognized by the E. E. O. C. for seven years, and has been recently recognized by leading exponents of women's rights:

> "[M]aternity laws are provided to help the extension of the human race and not for—because they are men or women." (Harmon, *supra.*)
>
> "It seems to me the maternity benefits are not a sex benefit." (Hernandez, *supra.*)
>
> "[Maternity benefits are] primarily, to benefit the children." (Anderson, *supra.*)

Further in *Frontiero* v. *Richardson, supra,* four Justices of this Court stated, "that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." At 1768. This Court went on to explain that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently

bears no relation to ability to perform or contribute to society." at 1770.

Sex, then, is considered to be a suspect classification because it is an immutable characteristic determined solely by the accident of birth and because it bears no relation to ability to perform or contribute to society. Unlike sex, pregnancy is not an immutable characteristic and it cannot be said that pregnancy bears no relation to ability to perform or to contribute to society. Consequently, following the reasoning in *Frontiero* it is clear that pregnancy cannot be a suspect classification even though sex, race, and national origin may be.

The basis of the holding in *Frontiero* is a further reason to distinguish that case from the instant case. In *Frontiero*, this Court added:

> ". . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . .' We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process clause of the Fifth Amendment in so far as they require a female member to prove the dependency of her husband." at 1772.

Under the rationale of *Frontiero*, then, a regulation that treats men and women differently, would violate the Fourteenth Amendment only if it were maintained for the sole purpose of achieving administrative convenience. In the instant case, not only is the classification created by the exclusion of maternity benefits not sex based or suspect, but as a further distinction between this case and *Frontiero*, the purpose of the exclusion is not administrative convenience. Rather, the main purpose for the exclusion is to preserve the solvency of the benefit pro-

gram as discussed by appellant in detail. Consequently, because administrative convenience is not the purpose of the statutory exclusion of maternity benefits, following *Frontiero* the statute does not violate the Equal Protection Clause.

Because the Statute does not create a suspect classification, the compelling interest test can be utilized to review the constitutionality of the statute which excludes maternity benefits from disability insurance programs only if that exclusion abridges a fundamental constitutional right.

2. The Exclusion of Maternity Benefits Does Not Abridge Fundamental Constitutional Rights.

This Court in rejecting the opportunity to create "substantive constitutional rights in the name of guaranteeing equal protection of the laws [,]" has stated that the key to discovering whether a right is "fundamental" lies not in its social significance but rather in determining whether the right is explicitly or implicitly guaranteed by the Constitution.[50]

It is difficult to imagine what fundamental right is abridged by the State's regulation excluding maternity benefits from its disability insurance program. If the right to bear children is a fundamental right it is in no way abridged by the State's regulation. Women bear children every moment without any hope of receiving maternity benefits from any source. Nor is there any interference with the right to employment if that right is considered to be fundamental.[51]

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50. *San Antonio Independent School District* v. *Rodriguez*, *supra*, at 1297.

51. In *Dandridge* v. *Williams*, *supra*, this Court recognized that the usual rational basis standard was to be employed when evaluating the constitutionality of state legislation that restricted the availability of employment opportunities. This recognition indicates that the right to employment opportunities is not a fundamental constitutional right requiring added protection by the application of the compelling interest test. *Dandridge* cited with approval *Goesaert* v. *Clarie*, 335 U. S. 464 (1948) and *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

Because there is no fundamental constitutional right involved in this case, any argument that the State's statute is over-broad and therefore unconstitutional because it denies maternity benefits to all pregnant women regardless of the size of the disability claims has no place in this case. As this court observed in *Dandridge* v. *Williams, supra.*

> "If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, *e.g., Shelton* v. *Tucker,* 364 U. S. 479. But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488. That era long ago passed in to history. *Ferguson* v. *Skrupa,* 372 U. S. 726.

In *Goesaert,* this Court upheld a state statute prohibiting women other than wives and daughters of bar owners from becoming bar maids.

Consistent with the opinions of this Court is the Sixth Circuit's opinion in *Orr* v. *Trinter,* 444 F. 2d 128 (1971) cert. denied 408 U. S. 943 (1972), rehearing denied .... U. S. ..... In *Orr,* a public school teacher alleged that his constitutional rights were violated because the School Board without reason refused to renew his teaching contract. He asserted that the Fourteenth Amendment prevented the State from depriving him of life, liberty and property without due process. While this was a case arising under the Due Process Clause, the court nonetheless in a statement relative to these proceedings held that there is "no constitutionally protected right to government employment." at 133, 134.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426."

We have seen that the statute denying maternity benefits under the State insurance program does not operate to the disadvantage of a suspect class or abridge fundamental constitutional rights. Therefore, strict judicial scrutiny is not required. Nonetheless, the statute must be examined to determine if it rationally further a legitimate state purpose and, therefore, does not constitute invidious discrimination in violation of the Equal Protection Clause. To this examination we now turn.

3. The Statute Denying Maternity Benefits Under the State Insurance Program Does Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Its Constitutionality.

As this Court stated, "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero* v. *Richardson*, *supra*, at 1768. The rational basis test then employs three standards: first, a legitimate governmental purpose must be found to exist; second, the classification created by the statute must be rationally related to and further this legitimate governmental interest; third, all persons within the class must be treated alike.[52]

52. *United States Department of Agriculture* v. *Moreno*, 93 S. Ct. 2821 (1973); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Frontiero* v. *Richardson*, *supra*.

The disability insurance program has an objective to provide the broadest coverage and maximum benefits at the least cost to employees. Maternity benefits are excluded because the State believes, based upon study and deliberation that this exclusion is necessary if the program is to remain solvant and meet its objectives. This has been set forth in detail by the appellant. Both the desire to keep the program solvant and the broader objective to provide disability benefits are valid State objectives. Exclusion of maternity benefits is necessary in the State's reasonable judgment to achieve those objectives. Consequently, it is clear that the State's regulation meets the standards of the traditional or reasonable basis test and the classification created by the regulation does not violate the Equal Protection Clause even though the regulation results in different classes of persons being treated in different ways.

While California excludes maternity benefits from its disability insurance program and while other states such as New Jersey and Rhode Island limit maternity payments to a fixed period[53] this difference merely reflects the individual judgment of the state legislatures. Such legislative discretion has been respected by this Court.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results, in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70."

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53. Summary of State Labor Laws, U. S. Department of Labor, March, 1969.

Whether a state should require a fixed period for maternity benefits or completely exclude maternity benefits from a disability insurance program depends upon many variables such as population that are best known to the legislature of each state. An application of the reasonable basis test by this Court when it determines the constitutionality of a statute such as involved in this case will allow a state legislature to continue to exercise this discretion in a manner calculated to maintain the fiscal integrity if its a benefit program and to achieve maximum benefit for all its citizens. However, application of the stricter standard of review may well foreclose any legislative discretion and by requiring the state to pay maternity benefits in the same manner as it compensates for illness or injury drastically curtail disability insurance programs. Indeed, as the Appellants in their brief, and as the dissenting opinion of Williams, District Judge, in the court below set forth in detail, California's disability insurance program would be in jeopardy of insolvency if the State could not exclude maternity benefits from this disability insurance program. In order that a state may continue to provide the broadest insurance coverage and maximum benefits within the limits of a reasonable employee contribution, this Court should apply the rational basis test when it evaluates the constitutionality of statutes such as the statute in the instant case. When this test is applied, the constitutionality of the statute in this case is assured.

CONCLUSION.

The questions presented by this appeal are substantial and have broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO,
Individually and on Behalf of
All Others Similarly Situated,

Appellees,

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ET AL.,
Individually and on Behalf of All
Other Women Similarly Situated,

Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF FOR GENERAL ELECTRIC COMPANY, AS AMICUS CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

This brief *amicus curiae* in support of the Jurisdictional Statement herein is filed by General Electric Company with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

INTEREST OF GENERAL ELECTRIC COMPANY

General Electric Company (hereinafter "GE") is engaged in the manufacture of industrial electrical equipment, products for national defense, consumer electrical appliances, electronic equipment, medical equipment, jet engines, and in addition, an almost endless array of electrical items and machinery. GE has over 250 manufacturing plants located in some 33 states and territories of the United States. It is one of the largest employers in the United States, employing more than 310,000 persons.

GE employees, of whom approximately 85,000 are females, are covered by non-occupational sickness and accident insurance which provides them with weekly income maintenance benefits for total disability resulting from non-occupational sickness or accidents. Benefit payments under such insurance are not payable, however, for any absence from work due to pregnancy or childbirth or to complications in connection therewith.

GE is the defendant in a civil suit presently pending in the United States District Court for the Eastern District of Virginia, Richmond Division (*Gilbert, et al., Plaintiffs*, v. *General Electric Company, Defendant*, No. 142-72-R), in which issues have been

[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

raised analogous to those in the case before the Court. The amended complaint in the suit, which the District Court has allowed to proceed as a class action on behalf of GE female employees, alleges in substance that GE, in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), has discriminated, and is discriminating, against its female employees because of their sex by maintaining in effect the above-described sickness and accident insurance with the indicated pregnancy exclusion, and by denying benefits thereunder to female employees for absences from work resulting from pregnancy or childbirth. Plaintiffs in the suit are seeking, *inter alia*, an injunction requiring the elimination of the pregnancy exclusion from GE's sickness and accident insurance coverage, and monetary damages. It is anticipated that the District Court will render a decision in the suit before the end of the year, trial having been held in July 1973.

GE has a very real and direct interest in this case because it presents fundamental issues pertaining to alleged discrimination on the basis of sex which are similar to issues that have been raised in the *Gilbert* case against GE now pending in the District Court. In GE's view this case was decided erroneously by the court below. Thus, as the outcome of this case may affect the ultimate outcome of *Gilbert*, GE has a substantial interest in the Court's correction and reversal of the decision below.

ARGUMENT

A. The Case Before the Court is Likely to Affect the Disposition of Issues Relating to the Insurance Treatment of Pregnancy Under Title VII of the Civil Rights Act of 1964, as Amended.

1. Although the case before the Court arose out of a challenge to a pregnancy exclusion from a State disability insurance program designed to provide benefits for illness or injury, and although the case presents a narrow equal protection issue under the Fourteenth Amendment, its outcome may affect the interpretation and implementation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261. See the statement to the same effect by Circuit Judge Winter, dissenting in *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395, 399-400 (4th Cir. 1973), presently pending in this Court after oral argument (No. 72-1129, Oct. Term, 1972).

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits most private and public employers from discriminating against any individual in his employment, or from otherwise treating an employee adversely or unfairly, "because of [the] individual's . . . sex" (42 U.S.C. 2000e-2(a)), except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. 2000e-2(e)(1)). To implement this statutory prohibition, the Equal Employment Opportunity Commission has published guidelines—upon which we comment below—stating

in part that "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10.[2] Thus, although the construction and application of Title VII are not before the Court, the reach of this case must be weighed in the light of the fact that the agency charged with administering Title VII has determined that a pregnancy exclusion like that here under attack would, if in a private or public employee disability plan,

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[2] The relevant guidelines, in full, are as follows:

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

violate the statutory prohibition against sex discrimination. In this connection, it is most significant that the Equal Employment Opportunity Commission in fact filed a brief in the court below in support of the instant Appellees. The brief made specific reference to the above-quoted EEOC guidelines on sex, and recited at the outset that the Commission was filing the brief "because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act. . . . The Commission believes that, under both Title VII and the Fourteenth Amendment, a policy denying disability benefits to women workers disabled by pregnancy is illegal sex discrimination." The Commission, moreover, appeared and pressed this point in oral argument before the court below.[3] In sum, although Fourteenth Amendment and Title VII issues do not turn on the same considerations—for example, underlying Congressional intent could be decisive in ascertaining the meaning of Title VII—the likelihood

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[3] See also Memorandum For The United States As Amicus Curiae filed by the Solicitor General in Nos. 72-777 and 72-1129, *Cleveland Board of Education* v. *La Fleur* and *Cohen* v. *Chesterfield County School Board*, now pending in this Court after oral argument. There, in cases which also presented Fourteenth Amendment sex discrimination issues, the Solicitor General stressed the materiality of the relevant EEOC guidelines, and stated, ". . . the Court's resolution of the issue under the Equal Protection or Due Process Clause, while not dispositive may well bear on the validity of the guidelines." Memorandum, p. 2.

exists that this case may well affect the disposition of related Title VII cases.[4]

2. The ramifications of this case will affect insurance companies and virtually all employers in the United States who provide sickness and accident disability insurance for their employees. Here, statistics are revealing. Approximately 40 per cent of the work force under age 65, or some 32,168,000 employees, is covered by such insurance. Benefit periods under the insurance are not uniform: about 45 per cent of the plans provide 13 weeks of benefits; 50 per cent provide benefits for 26 weeks; and 5 per cent provide benefits for 52 weeks. But only about 42.6 per cent of the plans, covering about 13,500,000 employees, provide benefits for disability resulting from pregnancy or childbirth; and even here, where maternity coverage is provided, almost always the benefit period is no longer than six weeks. Thus about 57.4 per cent of the plans, covering about 18,600,000 employees, provide no maternity benefits whatever; and even under the relatively smaller number of plans that do provide benefits for pregnancy or childbirth, the benefits so provided are less (i.e., the benefit period is shorter) than those provided for non-pregnancy re-

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[4] In addition to the *Gilbert* case, *supra*, the following Title VII cases involving disparate treatment of pregnancy in the context of insurance or sick leave plans, are now pending in United States district courts: *Grogg* v. *General Motors Corporation*, No. 73 Civ. 63, S.D. N.Y.; *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, No. 73-C-959, N.D. Ill.; *Newman* v. *Delta Airlines, Inc.*, No. 15,681, N.D. Ga.; *E.E.O.C.* v. *E. I. duPont deNemours & Co.*, Civil Action No. 4515, D.C. Del.

lated disabilities.[5] According to one actuarial estimate,[6] the annual cost of adding maternity benefits to disability income protection plans currently in effect in the United States would be $1,353,000,000.

B. Current EEOC Guidelines Relating to the Treatment of Pregnancy Under Disability Insurance Plans are not Entitled to Judicial Deference.

We anticipate that the Equal Employment Opportunity Commission's current guidelines relating to the treatment for job-related purposes of disabilities due to pregnancy or childbirth, *supra* note 2, may be cited to the Court as a ground for dismissing Appellant's Jurisdictional Statement. For this reason, and even though the court below did not expressly advert to the guidelines, we comment on them here in order to show that they are not entitled to the deference normally accorded administrative interpretations. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Udall* v. *Tallman*, 380 U.S. 1 (1965).

Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965 (30 F.R. 14926); they were amended by the Com-

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[5] The statistical summary in the text with respect to employer-provided sickness and accident disability insurance coverage in the United States is derived from the testimony of Actuary Paul Jackson set forth at pp. 348-349 of the official transcript of proceedings in *Gilbert* v. *General Electric Company, supra*, No. 142-72-R, United States District Court for the Eastern District of Virginia, Richmond, Virginia. Mr. Jackson, a Fellow in the Society of Actuaries, has worked in the area of disability insurance coverages since 1956.

[6] By Actuary Paul Jackson, set forth in Defendant's Exhibit 42, *Gilbert* v. *General Electric Company, supra* note 5.

mission on February 21, 1968 (33 F.R. 3344), were again amended on August 19, 1969 (34 F.R. 13367), and were last amended and revised on March 31, 1972 (37 F.R. 6835). The earlier guidelines expressed no view with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. Indeed, the topic was adverted to in the guidelines for the first time in 1972 when with the issuance of the amendments of March of that year, the guidelines in their present form, *supra* note 2, were published.

The position set forth in the current guidelines represents, moreover, a clear departure from, and contradiction of, the prior published position by the EEOC. The prior position was set forth in a series of opinion letters issued by the EEOC's General Counsel in 1966. These letters thus set forth the Commission's then position and policy:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.
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> * * * *
>
> Your second question is whether an employee disability benefit plan financed by both the employer and the employees may exclude from coverage disability resulting from the employee's pregnancy. You state that certain other forms

of disability, e.g., disability arising in the course of employment, disability arising from the employee's misconduct, etc., are likewise excluded.

In a recent opinion letter regarding pregnancy we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory. . . .[7]

In testimony given in *Gilbert* v. *General Electric Company, supra*, a former EEOC General Counsel,[8] who occupied that office for some 15 months in 1965 and 1966, stated with respect to the foregoing statements in 1966 EEOC letters that: (1) they reflected official EEOC policy during his incumbency as General Counsel; (2) during the first year of the EEOC's existence—i.e., the year beginning July 2, 1965—questions and problems respecting sex discrimination "occupied a good deal of the Commission's attention" and "were thoroughly discussed by the Com-

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[7] The excerpted passages set forth in the text were identified as representative of similar statements in EEOC opinion letters issued in 1966 in response to inquiries made of the Commission. Testimony of Charles Duncan, Esq., former EEOC General Counsel, in *Gilbert* v. *General Electric Company*, No. 142-72-R, E.D. Va. See the Appendix hereto.

[8] Charles Duncan, Esq., currently President of the District of Columbia Bar. Pertinent excerpts from Mr. Duncan's testimony in the *Gilbert* case are set forth in the Appendix hereto.

mission," and, during the same period, the treatment of pregnancy disabilities under an employer's disability insurance plan was specifically considered by the full Commission; (3) in formulating its 1965-1966 policy, the Commission considered and inquired into the legislative history underlying Title VII with respect to sex discrimination; (4) the Commission's 1965-1966 policy and position was that pregnancy could be treated differently from "medical illness," and that under an employer-sponsored employee disability insurance plan it was not necessary "to provide the same benefits for maternity absence [as] for illness-caused absence;" and (5) in the course of its 1965-1966 deliberations on sex discrimination, the Commission "extensively considered" and discussed as a possible alternative the policy reflected in the current EEOC guidelines with respect to the treatment of pregnancy-caused disabilities under employee disability insurance plans, considering such a policy in the light of the legislative history underlying Title VII, but consciously and deliberately rejecting it.

In *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965), the Court gave deference to an interpretation of the Secretary of the Interior only after a detailed analysis showed that his interpretation had been contemporaneous, consistent, heavily relied upon, and was not unreasonable. In *Griggs, et al.* v. *Duke Power Company*, 401 U.S. 424, 433-436 (1971), the Court did not accept the EEOC interpretation until it was convinced by a thorough review of the legislative history that "the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent." 401 U.S. at 436. These cases demon-

strate that judicial acceptance of administrative interpretations depends upon careful scrutiny; or, as this Court said in *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140:

> The weight of such a judgment [i.e., the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

The element of administrative consistency was subsequently emphasized in *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67 (1973), where the Court, relying in part on the "Board's longstanding administrative construction" to uphold the Board's position that the Board is not required to inquire into the reasonableness of union fines, said (412 U.S. at 75):

> We have held in analogous situations that such a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts. [Citations omitted.]

Under these standards, we submit, the EEOC's 1972 guidelines here discussed are entitled to little, if any, weight: having been issued some seven years after Title VII went into effect, they do not represent a "contemporaneous construction;" and they certainly are not consistent with the previous 1966-1971 EEOC position and policy. Indeed, only the 1966-1971 EEOC policy and published construction meet the criteria for deference as enunciated by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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Dated: November 1973.

APPENDIX

Excerpts from the Official Transcript of Proceedings in *Gilbert v. General Electric Company*, No. 142-72-R, United States District Court for the Eastern District of Virginia:

* * * *

[542] *CHARLES DUNCAN* was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

* * * *

[549] DIRECT EXAMINATION

BY MR. STRAUSS:

Q Would you state your name and residence address, sir?

A Charles T. Duncan, D-u-n-c-a-n, 1812 Upshur, U-p-s-h-u-r Street, NW, Washington, D. C.

Q Mr. Duncan, what is your occupation or profession?

A I am an attorney at law admitted to practice in the District of Columbia.

* * * *

[550] Q Are you an officer of the District of Columbia Bar?

A Yes. We have a unified D. C. Bar and I am this year President of that organization.

Q Now, prior to your becoming engaged in the private practice of law in the District of Columbia were you employed in an official capacity by the District of Columbia Government?

A Yes. I was Corporation Counsel for the District of Columbia.

* * * *

[551] Q You were, were you not, at one time, employed by the EEOC?

A Yes, I was.

Q And in what capacity were you so employed?

A I was General Counsel of the Equal Employment Opportunity Commission.

Q And would you pinpoint the dates?

A I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q You just don't remember, but in view—

A It was sometime very late in October.

Q In October, 1966?

A That is correct.

* * * *

[553] Q Mr. Duncan, the letter[s] which represent the Defendant's Exhibit Number 12, are you the author of the letter[s]?

A Well, let me respond this way. These letters were prepared in my office. As to whether I drafted particular language, I don't remember that, but I do recognize the two letters as being letters which were prepared in my office or certainly similar to letters which were prepared in my office.

* * * *

[555] Q Is it a fair statement to say, sir, that letters containing . . . similar opinions to those expressed therein were sent out by you before you left the Commission in response to inquiries made of the Commission?

A Yes.

* * * *

[559] Q Do you recall whether letters setting forth opinions such as those [set] forth in Defendant's Exhibit 12 were discussed at any time with the Commission?

A You mean on the specific point of pregnancy? Maternity leave?

Q The matters discussed and set forth in those letters?

A Yes.

This was one of the issues that I would not have decided on my own initiative, and indeed did not.

This particular question, how to treat [560] pregnancy and maternity leave, was particularly discussed at the Commission level and with senior staff in order to formulate the Commission's policy.

Q What about the matter of the treatment of pregnancy disabilities under an employment—under an employer's disability plan?

A That subject was discussed at the Commission level.

Q Do you recall who was present at these discussions?

A I cannot pinpoint a discussion or a date. I do know that this question was considered by the full Commission, and I know who the Commissioners were.

Q Now, do the letters, that is, do the letters which are in evidence as Defendant's Exhibit 12 reflect the policy of the EEOC during your incumbency as General Counsel with respect to the treatment of pregnancy disabilities under an employer disability benefit plan?

A Yes.

* * * *

[561] Q Now, how thoroughly was this matter discussed within the Commission?

A I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.

Pregnancy, maternity leave was one aspect of the sex discrimination.

It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

Q When the Commission was consider[ing] the formulation of these policies which are set forth in the exhibit, was there any consideration given to the legislative history of Title 7 with respect to sex discrimination?

A Unfortunately, Mr. Strauss, as I am sure you know, there is little or no legislative history of Title 7 insofar as sex discrimination was concerned.

We wished that there had been some, but as you know, the word was added to race, color, religion, et cetera, not fortuitously but without any legislative history.

[562] Q But whatever legislative—but you did make an inquiry into the question of whether there was explicit legislative history?

A Oh, indeed, because in interpreting Title 7 we relied heavily on the legislative history whenever it was available. I am saying in the instance of sex discrimination there wasn't any.

* * * *

[563] Would you look at the last sentence, please, in the November 15 letter?

A Yes.

Q Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q Pay continuation, are you saying?

A Yes.

Q During pregnancy?

A Yes. During the absence.

Q Whether or not the pregnancy was covered by a disability policy, is that what this refers to?

A No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be [564] it under company policy or under various sickness and health plans.

Q Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof?

A Yes.

Q I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However

the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

* * * *

[566] Q Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972?

A Yes, I have.

Q How recently was that?

A As recently as today.

Q You [are] then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities?

A Yes.

Q Now, in 1966 when the policy formulated in the letter[s] we have here was taking place, was there any discussion within the Commission of a policy such as appears in the 1972 guidelines?

A I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy [567] on this point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q And rejected?

A Well, the Commission's policy was as these letters state.

Q So that this may be clear, [it] may have been evident, but I presume then that when the so-called 1972 policy was discussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time?

A I am sure it was. I don't specifically remember that.

* * * *